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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 **DONALD EUGENE RANDONICH,**

15 Petitioner,

16 v.

17 **D.K. SISTO, Warden,**

18 Respondent.

C 07-3730 RMW (PR)

**REPLY TO OPPOSITION TO
MOTION TO DISMISS PETITION
FOR WRIT OF HABEAS CORPUS
AS UNTIMELY**

19
20 Respondent D.K. Sisto, Warden, has filed a motion to dismiss the petition for writ of
21 habeas corpus as filed beyond the statute of limitations period set forth in 28 U.S.C. § 2244(d)(1).
22 Petitioner opposes the motion. We reply to his opposition.

23 **ARGUMENT**

24 Petitioner rejoins that his petition for writ of habeas corpus is not untimely, because it
25 relies on new caselaw: *Cunningham v. California*, 549 U.S. 270 (2007). As we understand him,
26 petitioner asserts that he may raise a *Cunningham* claim because *Cunningham* was based on *Blakely*
27 *v. Washington*, 542 U.S. 296 (2004), which was in turn based on *Apprendi v. New Jersey*, 530 U.S.
28 466 (2000), the last of which issued *before* petitioner's judgment became final. Whatever

1 petitioner's contention, it is foreclosed as explained in respondent's Motion To Dismiss at 3.

2 As set out in respondent's motion to dismiss, petitioner's judgment of conviction became
3 final on September 17, 2002. Thus, his judgment became final after the 2000 issuance of *Apprendi*
4 *v. New Jersey*, 530 U.S. 466, but before the 2004 and 2007, respectively, issuance of *Blakely v.*
5 *Washington*, 542 U.S. 296 and *Cunningham v. California*, 549 U.S. 270.

6 Because *Apprendi* issued *before* petitioner's judgment became final, any claim based in
7 that case is foreclosed by a straightforward application of the statute of limitations. That is, because
8 petitioner filed his petition more than a year—five years in fact—after the September 17, 2002,
9 commencement of the limitations period, his petition is untimely as to any *Apprendi* claim.

10 Because *Blakely* and *Cunningham* issued *after* petitioner's judgment became final, any
11 claim based in those cases will not extend the (2002) commencement of the limitations period unless
12 they have been made retroactively applicable to cases final before their issuance. As discussed in
13 our initial brief, *Blakely* does not apply retroactively to cases that became final its 2004 issuance.
14 *Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005); *see also United States v. Cruz*, 423 F.3d
15 1119, 1121 (9th Cir. 2005) (holding that *United States v. Booker*, 543 U.S. 220 (2005), does not
16 apply retroactively to cases on collateral review). Although the Ninth Circuit has applied
17 *Cunningham* retroactively, it has only done so back to the 2004 issuance of *Blakely*. *Butler v. Curry*,
18 528 F.3d 624 (9th Cir. 2008). In short, neither *Blakely* nor *Cunningham* delayed the commencement
19 of the limitations period here. *See* 28 U.S.C. § 2244(d)(1)(C).

20 CONCLUSION

21 Accordingly, for the reasons stated, and those set forth in our motion to dismiss,
22 respondent respectfully requests that the petition for writ of habeas corpus be dismissed with
23 prejudice as untimely.

1 Dated: August 13, 2008

2 Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Randonich v. Sisto, Warden**

No.: **C 07-3730 RMW (PR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 13, 2008, I served the attached

REPLY TO OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AS UNTIMELY

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Donald Eugene Radonich
P-23442
California State Prison-Solano
15 I 1LO
P.O. Box 4000
Vacaville, CA 95696

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 13, 2008, at San Francisco, California.

M. Argarin
Declarant

/s/ M. Argarin
Signature